UNITED STATES OF AMERICA, Appellant	)	IN THE COURT OF MILITARY COMMISSION REVIEW
	)	APPELLEE'S MOTION TO DISMISS PROSECUTION'S APPEAL OR, IN THE ALTERNATIVE, TO DISMISS A PORTION OF THE PROSECUTION'S NOTICE OF APPEAL AND TO SUMMARILY AFFIRM
	)	CASE No. 00000001
v.	)	
	)	Hearing Held[1] at Guantanamo Bay, Cuba on 4 June 2007 Before a Military Commission Convened by MCCO # 07-02 Presiding Military Judge Colonel Peter E. Brownback III
OMAR AHMED KHADR, Appellee	)	

TO THE HONORABLE, THE JUDGES OF THE COURT OF MILITARY COMMISSION REVIEW

Relief Sought

Appellee Omar Khadr respectfully requests that this Court dismiss the prosecution's appeal or, in the alternative, dismiss the portion of the prosecution's notice of appeal challenging the military judge's 4 June 2007 ruling that the military commission had no jurisdiction to try Appellee because the prosecution's notice of appeal was fatally untimely and summarily affirm the military judge's 29 June 2007 discretionary ruling declining the reconsider his previous ruling.

Introduction

Because the military commission system's speedy trial clock commences only once the prosecution makes the discretionary decision to charge an accused and the Convening Authority makes the discretionary decision to refer those charges to a military commission, the timing of a

[1] Mr. Khadr has yet to be arraigned.

commission prosecution is entirely within the government's control. For reasons known only to themselves, the prosecution and Convening Authority chose to commence the prosecution of Appellee before the Court of Military Commission Review had been completely established. One clearly foreseeable consequence of that decision is that no appellate court would be available to hear an interlocutory appeal in the event that a military judge dismissed the charges in the case.

On 4 June 2007, that completely foreseeable event occurred. Documents that have now been revealed to the defense demonstrate that in the wake of the military judge's ruling, Department of Defense officials engaged in a hurried attempt to bring this Court to life. But as often occurs when haste replaces deliberation, that attempt was botched. An unauthorized official purported to name this Court's Chief Judge. That same official changed the military commission system's procedures by creating the new position of "Deputy Chief Judge" without providing Congress with the necessary 60-day notice of change. And that new official, who had no authority to promulgate this Court's rules, purported to do so—and purported to do so without obtaining the required secretarial review and approval. The result of these, and other, irregularities is that the adoption of this Court's rules—which is a necessary prerequisite for a prosecution appeal to be filed with this Court—was accomplished in an impermissible manner. This Court's rules do not exist. As a consequence, the prosecution's appeal was not filed in the manner required by the governing regulations. Because the law disfavors prosecution appeals and governing statutes and regulations are strictly construed *against* the prosecution's right to appeal, the prosecution's appeal must be dismissed, leaving the military judge's 4 June 2007 ruling in place.

Even if this Court did have power to consider the prosecution's appeal, the only issue properly before this Court is whether the military judge abused his discretion by declining to reconsider his previous ruling. The merits of that previous ruling are not properly before this Court. As the Supreme Court recently emphasized in *Bowles v. Russell*, 127 S. Ct. 2360 (2007), a statutory deadline for filing a notice of appeal is jurisdictional. The prosecution did not file a notice of appeal seeking review of the military judge's 4 June 2007 ruling within the five-day statutorily prescribed period. Clear Supreme Court case law compels that the portion of the prosecution's notice of appeal purporting to challenge that ruling be dismissed. Any appeal in this case must be limited to the narrow issue of whether the military judge manifestly abused his discretion by declining to choose to reconsider. Because declining to reconsider his opinion was clearly within the military judge's discretion in light of the prosecution's motion to reconsider, summary affirmance is appropriate. The merits of the military judge's jurisdictional ruling simply are not before this Court.

Facts

I

Facts related to the filing of the prosecution's notice of appeal.

On 4 June 2007, the military judge dismissed the charges against Mr. Khadr, ruling that the prosecution had not carried its burden of establishing jurisdiction to try him. The military judge in the case of *United States v. Hamdan* made a similar ruling. Following the military judge's ruling in this case, the trial counsel indicated on the record that the "prosecution requests 72 hours to consider whether to file an appeal" from the military judge's ruling. Record of Trial at 22. The government did not file an appeal within that 72-hour window.

Instead, on 6 June 2007, the trial counsel sent an e-mail to LTC Chappell, the Senior Attorney Advisor for the Military Commission Trial Judiciary, and opposing counsel in both the *Khadr* and *Hamdan* cases stating that "[t]he Prosecution intends to file motions for reconsideration with the Military Judges in both cases." Attachment A. At 1700 on 8 June 2007, the prosecution filed a motion to reconsider the military judge's ruling in *Khadr*. That motion included the following footnote:

> Trial counsel indicated on the record that the government requested time to consider an appeal to the Court of Military Commission Review under R.C.M. 908. However, an appeal by the government would be premature if noticed prior to a decision on this motion for reconsideration. Accordingly, the Prosecution will await a decision on this motion and then consider its options regarding appeal, if even necessary. To the extent that it would be required - and out of an abundance of caution - the Prosecution asks that any time period for the filing of a notice of appeal regarding this issue be tolled pending a decision on this motion.

Prosecution Motion for Reconsideration, *United States v. Khadr*, at 1 n.1 (8 June 2007).

At 1808 that same day, the military judge directed that the parties receive an e-mail stating the following:

> The undersigned received the Prosecution Motion for Reconsideration dated 8 June 2007 at 1704 hours. This message specifically denies what appears to be a request for relief contained therein. It does not address either the merits of the motion or any other procedural aspects of or matters contained in the motion.
>
> Reference is made to Footnote 1 to the Motion for Reconsideration. R.M.C. 908b (2) and (7) state that "If the United States elects to appeal, the trial counsel shall provide the military judge with written notice to this effect not later than five days after the ruling or order."
>
> R.M.C. 103a(11) states "When a period of time is expressed in a number of days, the period shall be in calendar days, unless otherwise specified. Unless otherwise specified, the date on which the period begins shall not count, but the date on which the period ends shall count as one day."
>
> The ruling in question was issued on 4 June 2007. The five day period stated in R.M.C. 908b(2) and (7) began on 5 June and the last day of the period is 9 June.

The military judge is not aware of any authority which he possesses to toll the period established by the Secretary of Defense in R.M.C. 908.

Further, the military judge is aware of the provisions of 10 U.S.C. Sec. 950d, Appeal by the United States. Sec. 950d(b) Notice of Appeal, states that "The United States shall take an appeal of an order or ruling under subsection (a) by filing a notice of appeal with the military judge within five days after the date of such order or ruling." The military judge is certainly not aware of any authority on his part to toll the time frame established by statute.[]

Footnote 1 states in part:

> "To the extent that it would be required - and out of an abundance of caution - the Prosecution asks that any time period for the filing of a notice of appeal regarding this issued be tolled pending a decision on this motion."

Insofar as footnote 1 is a request for relief, that relief is denied.

Peter E. Brownback III
COL, JA, USA
Military Judge

(Appellate Ex. 18).

On 29 June 2007, the military judge issued his ruling on the prosecution's reconsideration motion. The military judge did not reconsider his prior ruling. Rather, he expressly ruled as a "procedural" matter:

> In its Motion for Reconsideration, the government presented no new law, facts, or argument which were not presented, or fairly raised, or implied in its argument on 4 June 2007. Further, the prosecution presented no evidence or facts which the prosecution did not have the opportunity to present at the 4 June 07 session. The only factual issue - the written CSRT finding - is not disputed, as shown by AE 011. Having presented no new law and no new facts, there is no basis to reconsider and the Military Judge declines the opportunity to reconsider the 4 June 07 ruling.

Disposition of Prosecution Motion for Reconsideration at para. 3.c. (Appellate Ex. 23).

The military judge also provided a substantive ruling denying the motion to reconsider in case "the Court of Military Commission Review or the United States Court of Appeals for the

District of Columbia Circuit (DC Circuit Court) decide the ruling in paragraph 3c is incorrect." *Id.* at para. 4.

On 3 July 2007, the prosecution filed a Certificate of Notice of Appeal with the military judge. Attachment B. This notice stated, in part, "The Military Judge denied the motion to reconsider in a written ruling transmitted to the Prosecution via email at 1552 on June 29, 2007." The prosecution's certificate failed to note that as a procedural matter the military judge had declined to entertain the prosecution's motion and that the military judge expressly framed the denial of the prosecution's motion to reconsider as an alternative ruling, reasoning: "Assuming, *arguendo*, that the disposition of the Motion for Reconsideration on procedural grounds in paragraph 3c is erroneous, the Military Judge denies the Motion for Reconsideration on the merits as outlined in this paragraph." Disposition of Prosecution Motion to Reconsider at para. 4.g. The prosecution's certificate also referred to both the military judge's initial 4 June ruling dismissing the charges and specifications and the 29 June ruling on reconsideration and stated that "the Prosecution appeals each of the decisions of the Military Judge under 10 U.S.C. § 950d(b)."

On 4 July 2007, the prosecution e-mailed its appeal to Mr. LeRoy Foreman, Mr. Mark Harvey and CAPT John Rolph, JAGC, USN. Attachment C. Mr. Foreman was not sworn in as the Clerk of Court until 11 July 2007. *United States v. Khadr*, CMCR Case No. 07-001, Case Assignment (Ct. Mil. Comm'n Rev. July 11, 2007) (see journal entry appended to Case Assignment). Mr. Harvey was not sworn in as the Deputy Clerk of Court until 11 July 2007. *Id.*

II

Facts related to the promulgation of this Court's Rules.

On 6 June 2007, two days after the military judges in both this case and the *Hamdan* case dismissed the charges without prejudice, Mr. LeRoy F. Foreman sent an e-mail to the Chief Defense Counsel and the Chief Prosecutor, copied to the Department of Defense's Deputy General Counsel for Legal Counsel, stating:

> Gentlemen:
>
> Attached for your information are draft rules of procedure for the Court of Military Commissions Review. They are substantially the same as the rules adopted by the Military Commission Review Panel, but they have been conformed to the Military Commissions Act, the Manual for Military Commissions, and the DoD Regulation for Military Commissions.
>
> The revised rules have not yet been approved and adopted. However, I am providing you the draft rules so that you may use them as guidance in the event any pleadings are filed with the Court as a result of decisions in Hamdan and Khadr.
>
> The address for the Clerk of Court, referred to in Rule 5, is listed below.
>
> LeRoy F. Foreman
> Clerk of Court, Court of Military Commissions Review
> One Liberty Center
> 875 N. Randolph St.
> Arlington, VA 22203
> Telephone: 703-696-6640
> Fax: 703-696-1831

Attachment D. While the e-mail purports to be sent in Mr. Foreman's capacity as the Clerk of Court, later documents would indicate that he was not sworn into that position until 11 July 2007. *United States v. Khadr*, CMCR Case No. 07-001, Case Assignment (Ct. Mil. Comm'n Rev. July 11, 2007) (see journal entry appended to Case Assignment).

Both the Manual for Military Commissions and the Regulation for Trial by Military Commissions provide that the Chief Judge shall prescribe this Court's rules. *See* Rule for

Military Commissions 1201(b)(4) [hereinafter R.M.C.]; Regulation for Trial by Military Commissions at para. 25-3 (27 April 2007). At the time when Mr. Foreman circulated the draft rules, no Chief Judge had been named.

On 11 June 2007, the General Counsel of the Department of Defense forwarded an Action Memo to the Secretary of Defense concerning the "Chief Judge of the Court of Military Commission Review." Action Memo from William J. Haynes II to the Secretary of Defense, Subject: Chief Judge of Court of Military Commission Review (June 11, 2007) (Attachment D to Appellee's Motion to Attach, *United States v. Khadr* (19 Jul 2007)) [hereinafter Chief Judge Appointment Memo]. In this memo, the General Counsel advised the Secretary of Defense that "Rule for Military Commission 1210(b)(2) provides that the Secretary of Defense shall appoint a Chief Judge of the CMCR." *Id.* The memo recommended that the Honorable Griffin Bell be appointed to the position of Chief Judge of the CMCR. Secretary Rumsfeld had previously appointed Mr. Bell as a Judge on this Court. (*See* Attachment A to Appellee's Motion to Attach, *United States v. Khadr* (19 Jul 2007)).

The General Counsel's 11 June 2007 memo also recommended that the Secretary of Defense "create the position of Deputy Chief Judge of the CMCR and appoint a Deputy Chief Judge, from among the 16 appellate military judges currently serving on the CMCR, to provide continuity of operations." *Id.* According to the Action Memo, "The Deputy Chief Judge would have full discretion to exercise all the authority vested in the Chief Judge, except as otherwise directed by the Chief Judge." *Id.* The Action Memo proposed appointing CAPT Rolph to this position. *Id.* CAPT Rolph had previously purportedly been appointed as a Judge on this Court by the Deputy Secretary of Defense. (*See* Attachment B to Appellee's Motion to Attach, *United States v. Khadr* (19 Jul 2007)).

On this memo, the handwritten word "Deputy" appears before the typed "SECRETARY OF DEFENSE" in the "FOR" line. *Id.* A stamped block on the first page of the memo states, "DEPSECDEF HAS SEEN," with "GE APPROVES" handwritten above the date "JUN 15, 2007." *Id.* Initials apparently those of Deputy Secretary England appear on the "Approve" line below each of three recommendations: (1) "Appoint Judge Bell, from among the 16 previously appointed appellate military judges currently serving on the CMCR, as Chief Judge of the CMCR"; (2) "Establish the position of Deputy Chief Judge of the CMCR"; and (3) "Appoint Judge Rolph, from among the 16 previously appointed appellate military judges currently serving on the CMCR, as Deputy Chief Judge of the CMCR." *Id.* The handwritten date "6-15" appears below the initials following the third recommendation. *Id.*

In an e-mail dated 28 June 2007,[2] CAPT John Rolph indicated that he had been "formally sworn in as the Deputy Chief Judge of the Court of Military Commission Review (CMCR)" on 22 June 2007 and "*In this capacity*, I have approved and promulgat [sic] <<Rules of Practice CMCR Approval and Promulgation Letter.pdf>> e <<Rules for Court of Military Commission Review (27 June 2007)).pdf>> d [sic] the Rules of Practice for the CMCR." Attachment E (emphasis added). Two attachments were included in this e-mail. One included the Rules themselves. The other was a memorandum approving and promulgating the Rules. This memorandum indicated that it was from the "Deputy Chief Judge."

On 11 July 2007, CAPT Rolph sent an e-mail to Mr. Paul Ney, the Deputy General Counsel for Legal Counsel. In this e-mail, CAPT Rolph wrote:

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[2] Due to a typographical error in Chief Defense Counsel's email address in the e-mail's "To" block, this e-mail was not actually received in the Office of Military Commissions defense office until 9 July 2007, when Mr. LeRoy Foreman forwarded it to the Chief Defense Counsel. The defense does not allege any bad faith as a result of what was obviously an innocent mistake. The defense simply notes this fact to demonstrate that until after the prosecution's deadline had run, the defense was unaware that any official had even purported to promulgate rules of court.

> I had intended to contact you today regarding two housekeeping matters. First, I wanted to check with you to see if the SecDef had signed anything yet formally approving our Rules of Practice, as contemplated by the Rules for Military Commissions. Second, has the SecDef ratified in writing the Chief Judge/Deputy Chief Judge and military appellate judge appointments that were approved by Secretary England on June 15th and on May 8th, respectively? As you know, Section 950f of the MCA 2006 states that "The Secretary shall assign appellate military judges to a Court of military Commission Review". If it is not too much trouble, it would be useful for the CMCR to have that documentation in hand for the Court's historical record, and in case subsequent validation of our appointments is required.

United States v. Khadr, CMCR Case No. 07-001, Ruling on Request for Additional Judicial Disclosure at 2 (Ct. Mil. Comm'n Rev. July 30, 2007).

Mr. Ney replied: "I'm working on those ratifications. I'll work on the rules, too, though Reg 25-3, I think, provides that the Chief Judge's promulgation of the rules is sufficient." *Id.* CAPT Rolph responded: "Thank you very much. My concern is RMC 1201(b)(4), which suggests that our Court's Rules are subject to 'the review and approval of the Secretary.'" *Id.* at 1. Mr. Ney then replied: "Yes, John. I saw that. And, while I think the subsequent promulgation of the Reg covers us, I agree that the most prudent course is ratifiaction [sic] and explicit approval to remove any question." *Id.* In a ruling issued on 2 August 2007, this Court stated: "As of 1 August 2007, the Secretary of Defense and/or the Deputy Secretary of Defense have not approved or ratified the Court's Rules of Practice."

On 11 July 2007, the Court of Military Commission Review issued a document indicating that "[b]y direction of the Acting Chief Judge, the above-captioned case is assigned to Panel 1 (Rolph, Francis, and Holden) for decision." *United States v. Khadr*, CMCR Case No. 07-001, Case Assignment (Ct. Mil. Comm'n Rev. July 11, 2007).

Burden and Standard

Because this is a jurisdictional challenge to the authority of this Court, the burden is on the party asserting this Court's jurisdiction, which is the prosecution. *See Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). These claims, which arise from this appeal, are subject to *de novo* review.

Argument

I

Statutes authorizing prosecution interlocutory appeals and the regulations and court rules that implement them are construed strictly against the right of the prosecution to appeal.

As the Navy-Marine Corps Court of Criminal Appeals noted in the course of dismissing a government appeal due to an untimely notice of appeal, "statutes that authorize Government appeals, as well as regulations and appellate court rules implementing them, are strictly construed and enforced." *United States v. Santiago*, 56 M.J. 610, 612-13 (N-M. Ct. Crim. App. 2001). As the same court previously observed in the course of dismissing another government appeal due to an untimely filing of the record, statutes authorizing prosecution interlocutory appeals "are construed strictly against the right of the prosecution to appeal." *United States v. Pearson*, 33 M.J. 777, 779 (N.M.C.M.R. 1991); *accord United States v. Combs*, 38 M.J. 741, 743 (A.F.C.M.R. 1993). The court explained, "Because these statutes compete with speedy trial and double jeopardy protection as well as judicial impartiality and piecemeal appeal policies, prosecution appeals are not particularly favored in the courts." *Pearson*, 33 M.J. at 779. The Supreme Court has similarly observed that "in the federal jurisprudence, at least, appeals by the Government in criminal cases are something unusual, exceptional, not favored." *Will v. United States*, 389 U.S. 90, 96 (1967) (quoting *Carroll v. United States*, 354 U.S. 394, 400 (1957)).

Accordingly, this Court should strictly construe the M.C.A. and relevant regulations governing interlocutory appeals against the government.

II

The regulatory and statutory framework governing interlocutory appeals requires that the appeal be filed with Court of Military Commission Review in accordance with this Court's Rules and within five days of the challenged ruling.

In the Military Commissions Act, Congress provided that an interlocutory appeal "shall be forwarded, by means specified in regulations prescribed [by] the Secretary of Defense, directly to the Court of Military Commission Review." 10 U.S.C. § 950d(c). Rule for Military Commissions 908(c)(11) provides, "If the United States elects to file an appeal, it shall be filed directly with the Court of Military Commission Review, in accordance with the rules of that court." The Regulation for Trial by Military Commissions, which the Deputy Secretary of Defense promulgated pursuant to authority delegated to him by the Secretary of Defense under 10 U.S.C. § 959a(c), further provides: "Once the decision to file the appeal is made, the appeal must be filed with the CMCR within five days of the ruling." Regulation for Trial by Military Commissions at para. 25-5.f (27 Apr 2007). This regulatory and statutory scheme creates two absolute prerequisites for a successful prosecution interlocutory appeal: (1) the CMCR's rules must exist in order for the prosecution to file an appeal "in accordance with the rules of that court," R.M.C. 908(c)(11); and (2) a notice of appeal must be filed within five days of the ruling being appealed.

III

The prosecution's appeal must be dismissed because the Court of Military Commissions Review's Rules did not exist on 4 July 2007, thereby rendering it impossible for the prosecution to file its appeal "in accordance with the rules of that court" on that date.

Rule for Military Commissions 908(c)(11) provides, "If the United States elects to file an appeal, it shall be filed directly with the Court of Military Commission Review, in accordance with the rules of that court." If no CMCR Rules existed when the prosecution purported to file its appeal, then it was impossible for the prosecution to satisfy this regulatory requirement. Such a regulation governing a prosecution appeal must be "strictly construed and enforced." *Santiago*, 56 M.J. at 613. Under a plain meaning interpretation, and even more so under a strict reading and enforcement of R.M.C. 908(c)(11), any prosecution appeal filed before the adoption of this Court's rules must be dismissed. In fact, no properly promulgated CMCR Rules were in place on 4 July 2007 and no CMCR Rules are in place even today.

The process by which this Court's rules were purportedly adopted was extremely irregular. Both the Manual for Military Commissions and the Regulation for Trial by Military Commissions require that the *Chief Judge* adopt this Court's rules in consultation with the Court's other judges. R.M.C. 1201(b)(4); Regulation at para. 25-3. On 6 June 2007, no one had been named to the position of Chief Judge. Yet, on that day, Mr. LeRoy Foreman (purportedly acting in his capacity as Clerk of this Court, though it was later disclosed that he was not sworn into that position until 11 July 2007), sent the Chief Defense Counsel and the Chief Prosecutor an e-mail circulating draft rules of Court. On 28 June, CAPT Rolph purported to issue the Rules in his capacity as *Deputy* Chief Judge. And it has since been revealed that, despite a provision in

the Manual for Military Commissions requiring the Secretary of Defense to review and approve the Court's Rules, that never occurred. Those Rules are, accordingly, void.

No valid rules existed on 4 July 2007 for at least three separate reasons: (1) the rules were issued without the required review and approval by the Secretary of Defense; (2) the Rules were promulgated by the Deputy Chief Judge, who was not authorized to do so; and (3) nothing establishes that the Deputy Chief Judge conducted the required consultation with this Court's other Judges before purporting to approve and promulgate the Rules.

A. The CMCR Rules were promulgated without the required review and approval by the Secretary of Defense.

In Rule for Military Commissions 1201(b)(4), the Secretary of Defense established a prerequisite for the adoption of this Court's Rules: the Chief Judge's prescription of this Court's Rules is "subject to the review and approval of the Secretary." This regulatory requirement for promulgation of this Court's rules must be "strictly construed and enforced." *Santiago*, 56 M.J. at 613. This Court has definitively ruled that such review and approval did not occur. *See United States v. Khadr*, CMCR Case No. 07-001, Ruling on Motions to Attach, Expedite Oral Argument, and Disclosure (Ct. Mil. Comm'n Rev. Aug. 2, 2007). Accordingly, no rules of this Court exist, thereby preventing the Prosecution from filing an appeal in accordance with this Court's rules, as required by the governing regulation. The appeal must, therefore, be dismissed.

In an e-mail to CAPT Rolph, Mr. Ney suggested that he did not believe such review and approval was necessary in light of paragraph 25-3 of the Regulation for Trial by Military Commission, which provides: "The Chief Judge of CMCR, in consultation with other members of the CMCR, shall issue operating guidelines for the CMCR consistent with the M.C.A., the M.M.C., and this Regulation." For that view to be correct, paragraph 25-3 would have had to effect a change in R.C.M. 1201(b)(4)'s review and approval requirement. But paragraph 25-3

purports to do nothing of the sort. There is nothing inconsistent between R.M.C. 1201(b)(4) and paragraph 25-3. Paragraph 25-3 does not forbid the Chief Judge from seeking the Secretary's review and approval of the Court's rules; nor does it expressly dispense with such a requirement. By seeking the Secretary's review and approval, the Chief Judge would have complied with the Manual without offending the Regulation. Particularly in light of the requirement to construe the regulation against the prosecution's right to appeal, R.M.C. 1201(b)(4)'s secretarial review and approval requirement remained binding when CAPT Rolph purported to promulgate this Court's Rules. Paragraph 25-3's omission of any reference to the secretarial review and approval requirement is hardly surprising. Most of the provisions in the Manual for Military Commissions are not repeated in the Regulation for Trial by Military Commissions. That should not be interpreted as a sub silentio overruling of the Manuals' requirements.

But hypothesize that paragraph 25-3 did change R.M.C. 1201(b)(4)'s requirement for secretarial review and approval. That change could take effect only 60 days after the Secretary of Defense notified both the House and Senate Armed Services Committees of the change. *See* 10 U.S.C. § 949a(d). CAPT Rolph purported to approve this Court's Rules on 28 June 2007. Sixty days before that date was 29 April 2007. So unless the prosecution can establish that the Secretary of Defense reported to the House and Senate Armed Services Committee on or before 29 April 2007 that he was rescinding R.M.C. 1201(b)(4)'s secretarial notice and approval provision, any ostensible modification of that requirement was not in place when CAPT Rolph purported to approve and promulgate this Court's Rules. That approval and promulgation was, therefore, invalid under the governing regulation. Because the Rules were invalid, the prosecution's appeal was not filed "in accordance with" this Court's rules, as required by R.M.C. 908(b)(11). In keeping with the principle that regulations governing a prosecution appeal must

be "strictly construed and enforced," *Santiago*, 56 M.J. at 613, the appeal must therefore be dismissed.

B. The CMCR Rules were promulgated by the Deputy Chief Judge, who had no authority to promulgate the Court's Rules.

i. CAPT Rolph purported to promulgate the Rules in his capacity as Deputy Chief Judge – an official with no power to adopt this Court's Rules.

Perhaps the most obvious reason why CAPT Rolph had no authority to issue this Court's Rules was that he expressly purported to do so in his capacity as "Deputy Chief Judge." But both the Manual for Military Commissions and the Regulation for Trial by Military Commissions is clear on this point: only the Chief Judge has the authority to issue this Court's Rules. Regardless of whether the position of Deputy Chief Judge actually existed on 28 June 2007 and regardless of whether an individual in that position was authorized to fill in for an unavailable Chief Judge, CAPT Rolph did not purport to do so. Rather, he purported to act *as Deputy Chief Judge*, and as Deputy Chief Judge he simply had no authority to promulgate this Court's Rules. Contrast CAPT Rolph's actions in purporting to issue this Court's Rules in his capacity as Deputy Chief Judge with his action on 11 July 2007 purporting to assign the members of this panel as "Acting Chief Judge." *Compare* Attachment E *with United States v. Khadr*, CMCR Case No. 07-001, Case Assignment (Ct. Mil. Comm'n Rev. July 11, 2007).

The case of *United States v. Gray*, 14 M.J. 816 (A.C.M.R. 1982), is directly analogous. There a deputy staff judge signed a staff judge advocate's recommendation "acting in his capacity as deputy staff judge advocate." *Id.* at 819. The Army Court, in an opinion written by then-Judge and now CMCR Clerk of Court LeRoy Foreman, invalidated the subsequent convening authority's action, holding that the deputy staff judge advocate's action "does not meet the requirements of Article 61." *Id.* Similarly, here, the Deputy Chief Judge's action does

not meet the requirements of R.M.C. 1201(b)(4) or paragraph 25-3 of the Regulation for Trial by Military Commissions.

The Secretary of Defense could have appointed CAPT Rolph as the CMCR's Chief Judge. He did not. Rather, the Deputy Secretary of Defense appointed the Honorable Griffin Bell as the CMCR Chief Judge. The Secretary of Defense also gave Chief Judge Bell, and only Chief Judge Bell, the power to issue the CMCR Rules. Chief Judge Bell has not done so. Accordingly, no CMCR Rules currently exist. In the absence of such rules, R.M.C. 908(b)(11)'s requirements cannot be met and the prosecution's appeal must be dismissed.

ii. The position of Deputy Chief Judge did not exist at the time CAPT Rolph purported to promulgate this Court's Rules.

For the reasons set out at pages 16-17 in Appellee's Motion to Abate Proceedings, which Appellee hereby incorporates by reference, any change to R.M.C. 1201(b)(4) and paragraph 25-3 of the Regulation for Trial by Military Commissions purporting to authorize an official other than the Chief Judge to promulgate this Court's Rules could not take effect until 60 days after the change was reported to the House and Senate Armed Services Committees. *See* 10 U.S.C. § 949a(d). CAPT Rolph purported to issue this Court's Rules a mere thirteen days after the Deputy Secretary made this change. Accordingly, at the time when CAPT Rolph purported to promulgate this Court's Rules, R.M.C. 1201(b)(4) and paragraph 25-3 of the Regulation still reserved this rulemaking authority to the Chief Judge alone. Because the Deputy Chief Judge had no power to issue the Court Rules, his action purporting to do so is ultra vires. An official action that exceeds the scope of delegated authority is "ultra vires and void." *Fieldston Clothes v. United States*, 19 C.I.T. 1181 (Ct. Int'l Trade 1995); *see also Walko Corp. v. Burger Chef Systems, Inc.*, 554 F.2d 1165, 1169 (D.C. Cir. 1977); *Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 916 n.3 (3d Cir. 1981) (observing that an "action that is ultra vires and beyond the scope of

the delegated authority will be set aside") (quoting DICKINSON, ADMINISTRATIVE JUSTICE AND SUPREMACY OF LAW 41 (1927)). Because the purported promulgation of this Court's Rules is void, the prosecution did not, and could not, satisfy R.M.C. 908(b)(11)'s requirements for the filing of an appeal. The prosecution's appeal must, therefore, be dismissed.

iii. CAPT Rolph has never been properly appointed as a Judge on this Court and therefore cannot purport to exercise authority on its behalf.

For the reasons set out at pages 7-15 in Appellee's Motion to Abate Proceedings and pages 6-14 of Appellee's Reply to the Prosecution's Response, which Appellee hereby incorporates by reference, the Deputy Secretary of Defense had no authority to appoint CAPT Rolph as a Judge on this Court. His initial appointment being invalid, CAPT Rolph's subsequent elevation to the newly-created position of Deputy Chief Judge is similarly invalid. Because he was not actually a judge on this Court, CAPT Rolph had no authority to act on this Court's behalf by approving and promulgating the Court's Rules. As a result, that action is void and the prosecution did not, and could not, satisfy R.M.C. 908(b)(11)'s requirements for the filing of an appeal. The prosecution's appeal must, therefore, be dismissed.

C. The record does not establish that the Deputy Chief Judge conducted the required consultation with this Court's others Judges before purporting to approve and promulgate the CMCR Rules.

A third potential defect in the adoption of the Court's Rules also exists: R.M.C. 1201(b)(4) and paragraph 25-3 of the Regulation for Trial by Military Commissions require that the Chief Judge consult with the other judges on this Court before adopting the Court's Rules. Appellee has requested judicial disclosures indicating whether that process was satisfied. This Court has not yet ruled on that request. But because this motion is a jurisdictional challenge to this Court's power to hear this appeal, the burden is on the prosecution to establish that its appeal

was filed in accordance with this Court's Rules, as required by the governing regulations. Accordingly, unless the prosecution can establish that the required consultation with all of this Court's judges did occur, the appeal must be dismissed for that reason as well.

IV

The portion of the prosecution's notice of appeal purporting to appeal the military judge's 4 June 2007 ruling is untimely and must be dismissed.

The Military Commissions Act specifies that the prosecution may file an interlocutory appeal if it files "a notice of appeal with the military judge within five days after the date of such order or ruling." 10 U.S.C. § 950d(b). The military judge issued his ruling dismissing the charges without prejudice in this case on 4 June 2007. Any appeal of that ruling had to be filed no later than 9 June 2007.

As the Supreme Court emphasized less than two months ago: "This Court has long held that the taking of an appeal within the prescribed time is mandatory and jurisdictional." *Bowles v. Russell*, 127 S. Ct. 2360, 2363 (2007) (internal quotation marks omitted). The Supreme Court also observed that "the courts of appeals routinely and uniformly dismiss untimely appeals for lack of jurisdiction." *Id.* at 2364. This Court must do the same.

In *Bowles*, the Supreme Court emphasized the "jurisdictional significance" of "statutory time limits for taking an appeal." *Id.* Section 950d(b) of the MCA is precisely such a statutory time limit for taking an appeal.

The *Bowles* Court also emphasized the constitutional significance of adhering to statutory time limits: "Jurisdictional treatment of statutory time limits makes good sense. Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider. Because Congress decides whether federal courts can hear cases at all, it can also

determine when, and under what conditions, federal courts can hear them." *Id.* at 2365. Congress has expressly determined when, and under what conditions, this Court can hear an interlocutory appeal. It can do so only if the prosecution files a notice of appeal within five days of the ruling it wishes to appeal. Congress did not include any provision tolling the time for filing a notice of appeal upon a prosecution request for reconsideration.

In *Bowles,* the Court also emphasized that a court has "no authority to create equitable exceptions to jurisdictional requirements." *Id.* at 2366. Congress created a five-day limit for filing a notice of appeal. Congress created no exceptions to that limit. It is therefore this Court's duty to apply that limit without exception.

The prosecution filed its notice of appeal on 3 July 2007—29 days after the military judge's 4 June 2007 ruling. The notice of appeal was clearly untimely as to that ruling. Additionally, the prosecution was on actual notice of this fact, since the military judge informed the prosecution of its deadline to appeal and the lack of any ability to toll the appeal period on 8 June 2007. Still the prosecution let the deadline lapse. *Bowles* makes clear that even detrimentally relying on a federal district judge's order purporting to extend a statutory filing deadline will not remove the jurisdictional significance of the untimely filing. Such a result imposes far less hardship in this case, where the judge correctly advised the prosecution of its deadline but the prosecution let it lapse anyway.

The only ruling that was the subject of a timely notice of appeal was the military judge's order of 29 June 2007 declining to reconsider his earlier ruling because the prosecution had offered no new law or evidence that was unavailable to the prosecution when the issue was first considered. "Requests for reconsideration are committed to the sound discretion of the [trial] court." *Tiller v. Baghdady*, 294 F.3d 277, 284 (1st Cir. 2002). "An appellate court ought not to

overturn a trial court's denial of a motion for reconsideration unless a miscarriage of justice is in prospect or the record otherwise reveals a manifest abuse of discretion." *Ruiz Rivera v. Riley*, 209 F.3d 24, 27 (1st Cir. 2000). The military judge in this case was well within his discretion to decline to reconsider his previous ruling. As he found, the prosecution advanced neither new legal arguments nor new, previously unavailable evidence in its motion to reconsider. As the Third Circuit has emphasized, "The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence. Where evidence is not newly discovered, a party may not submit that evidence in support of a motion for reconsideration." *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985) (internal citation omitted). In this instance, the trial court was similarly well within its discretion to decline to grant reconsideration where the prosecution put forth no evidence that was not already within its possession when it litigated the original motion.

The military judge's decision declining to reconsider had nothing to do with whether the underlying decision was correct or incorrect. The decision was confined to whether he would exercise his discretion to reconsider it. He did not. That is now the only issue that this Court may address: when the military judge manifestly abused his sound discretion by declining to reconsider. He did not.

The prosecution could have filed a timely notice of appeal seeking this Court's review of the 4 June 2007 ruling. The military judge went so far as to sua sponte inform the prosecution of its deadline to appeal his 4 June 2007 ruling. For whatever reason, the prosecution did not do so. Instead of seeking an appeal as of right to this Court, the prosecution sought discretionary review from the trial judge. The prosecution should not be heard to complain about the foreseeable

consequence of that decision – a foreseeable consequence about which the trial judge actually warned the prosecution.

Where the only issue properly before this Court is the propriety of the trial judge's discretionary decision whether to choose to reconsider his previous ruling, summary affirmance of the trial judge's denial of the reconsideration request is appropriate. No extended analysis is necessary to determine that the military judge did not abuse his discretion in declining to entertain the prosecution's rehash of its previous arguments. In context, the prosecution's reconsideration motion *appears* far more like an attempt to stall for time while this Court was vivified rather than a true attempt to win the trial judge's reversal of his ruling. Declining to indulge the prosecution in rehashing its previous arguments was clearly within the military judge's sound discretion. This Court should summarily rule that the military judge did not abuse his discretion.

Conclusion

For the foregoing reasons, this Court should dismiss the prosecution appeal because it was not filed in compliance with the governing regulations or, in the alternative, dismiss the portion of the prosecution appeal that sought review of the 4 June 2007 ruling as untimely and summarily affirm the military judge's discretionary decision not to choose to reconsider his previous ruling.

Respectfully submitted,

Dennis Edney
234 Wolf Ridge Close
Edmonton, Alberta, T5T 5M6
Canada
Phone: (780) 489-0835
Email: dedney@shaw.ca
Law Society of Alberta (ID: 7997)
Admitted *pro hac vice*

Nathan Whitling
Parlee McLaws LLP
#1500, 10180 -101 Street
Edmonton, Alberta, T5J 4K1
Canada
Phone: (780) 423-8658
Facsimile: (780) 423-2870
Email: nwhitling@parlee.com
Law Society of Alberta (ID: 11321)
Admitted *pro hac vice*

William C. Kuebler
LCDR, JAGC, USN
Appellate Defense Counsel
Rebecca S. Snyder
Assistant Appellate Defense Counsel
Office of Military Commissions
1099 14th Street, N.W.
Suite 2000E
Washington, DC 20005
kueblerw@dodgc.osd.mil
snyderr@dodgc.osd.mil
202-761-0133 ext. 116
FAX: 202-761-0510

PANEL No. _____

GRANTED (signature) _____

DENIED (signature) _____

DATE _____

Certificate of Service

I certify that a copy of the foregoing was sent via e-mail to Major Jeffrey D. Groharing, USMC; Captain Keith A. Petty, JA, USA; and Lieutenant Clayton Trivett, Jr., JAGC, USN on 7 August 2007.

Rebecca S. Snyder
Assistant Appellate Defense Counsel

UNITED STATES OF AMERICA	)	IN THE COURT OF MILITARY COMMISSION REVIEW
	)	
	)	MOTION TO ATTACH
	)	
	)	CASE No. 07-001
	)	
	)	
v.	)	
	)	
	)	Hearing Held[1] at Guantanamo Bay, Cuba on 4 June 2007
	)	Before a Military Commission
OMAR AHMED KHADR	)	Convened by MCCO # 07-02
	)	Presiding Military Judge
	)	Colonel Peter E. Brownback III
	)	

TO THE HONORABLE, THE JUDGES OF THE COURT OF MILITARY COMMISSION REVIEW

Relief Sought

COMES NOW Mr. Omar Khadr and respectfully requests that this Court attach the following document to Mr. Khadr's Motion to Dismiss filed concurrently herewith:

A) Groharing email of 6 June 2007;

B) Certificate of Notice of Appeal filed by the government with the military judge on 3 July 2007;[2]

C) Groharing email of 4 July 2007; and

D) Foreman email of 6 June 2007.

[1] Mr. Khadr has yet to be arraigned.

[2] Although this document should be part of the record of trial, it does not appear to be contained in the record.

These documents are necessary to support the factual basis for Mr. Khadr's Motion to Dismiss. Therefore, this Court should grant Mr. Khadr's motion.

Dennis Edney
234 Wolf Ridge Close
Edmonton, Alberta, T5T 5M6
Canada
Phone: (780) 489-0835
Email: dedney@shaw.ca
Law Society of Alberta (ID: 7997)
Admitted *pro hac vice*

Nathan Whitling
Parlee McLaws LLP
#1500, 10180 -101 Street
Edmonton, Alberta, T5J 4K1
Canada
Phone: (780) 423-8658
Facsimile: (780) 423-2870
Email: nwhitling@parlee.com
Law Society of Alberta (ID: 11321)
Admitted *pro hac vice*

William C. Kuebler
LCDR, JAGC, USN
Appellate Defense Counsel
Rebecca S. Snyder
Assistant Appellate Defense Counsel
Office of Military Commissions
1099 14th Street, N.W.
Suite 2000E
Washington, DC 20005
kueblerw@dodgc.osd.mil
202-761-0133 ext. 116
FAX: 202-761-0510

PANEL No. _____
GRANTED (signature) _____
DENIED (signature) _____
DATE _____

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was emailed to this Court; Major Jeffrey D. Groharing, USMC; Captain Keith A. Petty, JA, USA; and Lieutenant Clayton Trivett, Jr., JAGC, USN on 7 August 2007.

Rebecca S. Snyder
Assistant Appellate Defense Counsel

—Original Message—

[redacted]

Subject: FW: FW: Motions for Reconsideration in U.S. v. Khadr and U.S. v. Hamdan

Sir,

Please see email trail below. Bottom line: First email attempted to notify judges of the Prosecution intent to file motions for reconsideration in both cases. We didn't have access to non-GTMO emails from GTMO, so everyone was not copied.

V/R,

Major Groharing

—Original Message—
From: [redacted]
Sent: Wednesday, June 06, 2007 2:21 PM
To: [redacted]
Cc:
Subject: Re: FW: Motions for Reconsideration in U.S. v. Khadr and U.S. v. Hamdan

(RESEND with corrected address for Col Sullivan.)

—- Original Message —-
From:
Date: Wednesday, June 6, 2007 14:18
Subject: Re: FW: Motions for Reconsideration in U.S. v. Khadr and U.S. v. Hamdan
To: [redacted]
Cc:

> I am traveling today and also don't have access to other email
> addresses. I will forward your email to the judges today and other
> counsel DoD addresses when I get back to my office NLT tomorrow
> afternoon. (Please fwd this note to Col Sullivan if his email address
> above is incorrect. Thanks.)
>
> LTC Mike Chappell, JA, USAR
> Department of Defense
> Office of General Counsel
> Military Commissions Trial Judiciary
> Washington, DC
> Naval Air Station Guantanamo Bay (GTMO), Cuba
>
>
> CAUTION: The information contained in this email and any accompanying
> attachments may contain protected information, including
> attorney-client or attorney work product privileged information. This
> information may not be released outside of the Department of Defense
> without prior authorization. If you are not the intended recipient of
> this information, any disclosure, copying, distribution, or the taking
> of any action in reliance on this information is prohibited. If you
> received this email in error, please notify immediately by return

Attachment A

> email (see 5 U.S.C.
> Section 552 and Army Regulations 25-55 and 27-26).
>
> Classification: UNCLASSIFIED
>
> Caveats: NONE
>
> —— Original Message ——
> From: [redacted]
> Date: Wednesday, June 6, 2007 11:11
> Subject: FW: Motions for Reconsideration in U.S. v. Khadr and U.S.
> v. Hamdan
> To: [redacted]
>
> > Sir,
> >
> > Please see below.
> >
> > V/R,
> >
> > Major Groharing
> >
> > ——Original Message——
> > From: [redacted]
> > Sent: Wednesday, June 06, 2007 11:10 AM
> [redacted]
> > Subject: Motions for Reconsideration in U.S. v. Khadr and U.S.
> v.
> > Hamdan
> > Sir,
> >
> >
> >
> > The Prosecution intends to file motions for reconsideration with the
> > Military Judges in both cases. At the present time we do not have
> > access to DoD email list. Please provide non-GTMO email address or
> > forward notice as appropriate.
> >
> >
> >
> > V/R,
> >
> >
> >
> > Major Groharing
> >

Attachment A

UNITED STATES OF AMERICA	)	
	)	
	)	
	)	
	)	**CERTIFICATE OF**
v.	)	**NOTICE OF APPEAL**
	)	
	)	
	)	
OMAR AHMED KHADR	)	
a/k/a "Akhbar Farhad"	)	
a/k/a "Akhbar Farnad"	)	**3 JULY 2007**
a/k/a "Ahmed Muhammed Khali"	)	

1. On June 4, 2007, at or about 1145, the Military Judge issued a ruling dismissing the charges and specifications in the above-captioned case without prejudice. On June 8, 2007, the Prosecution filed a motion for reconsideration of the Military Judge's dismissal of charges. The Military Judge denied the motion to reconsider in a written ruling transmitted to the Prosecution via email at 1552 on June 29, 2007.

2. Notice is hereby given that the Prosecution appeals each of the decisions of the Military Judge under 10 U.S.C. § 950d(b). The Military Judge will be served with this notice no later than 1700 on July 3, 2007. The appeal will be filed directly to the Court of Military Commission Review as required by 10 U.S.C. § 950d(c).

3. Additionally, as required by the Manual for Military Commissions, the Prosecution certifies that the appeal is not taken for the purpose of delay.

4. **Submitted by**:

Jeffrey D. Groharing
Major, U.S. Marine Corps
Prosecutor

Keith A. Petty
Captain, U.S. Army
Assistant Prosecutor

Clayton Trivett, Jr.
Lieutenant, U.S. Navy
Assistant Prosecutor

-----Original Message-----

[redacted]

Sent: Wed Jul 04 13:28:14 2007
Subject: Government Appeal in U.S. v. Khadr

Gentlemen,

Please find the attached Government brief in the case of United States v. Khadr.

The Governement will deliver the original record of trial plus three copies on Thursday morning, 5 July 2007.

Captain Keith Petty (cc'd above) and available at [redacted] will coordinate delivery with your office.

V/R,

Jeff Groharing
Major, U.S. Marine Corps
Prosecutor
Office of Military Commissions
[redacted]

Attachment C

From: Foreman, Leroy Mr DoD OGC
Sent: Wednesday, June 06, 2007 11:22:26 AM
To: Davis, Morris, COL, DoD OGC; Sullivan, Dwight, COL, DoD OGC
Cc: Ney, Paul, Mr, DoD OGC
Subject: Draft Rules of Procedure, Court of Military Commissions Review
Auto forwarded by a Rule

Gentlemen:

Attached for your information are draft rules of procedure for the Court of Military Commissions Review. They are substantially the same as the rules adopted by the Military Commission Review Panel, but they have been conformed to the Military Commissions Act, the Manual for Military Commissions, and the DoD Regulation for Military Commissions.

The revised rules have not yet been approved and adopted. However, I am providing you the draft rules so that you may use them as guidance in the event any pleadings are filed with the Court as a result of decisions in Hamdan and Khadr.

The address for the Clerk of Court, referred to in Rule 5, is listed below.

LeRoy F. Foreman
Clerk of Court, Court of Military Commissions Review
One Liberty Center
875 N. Randolph St.
Arlington, VA 22203
[redacted]
<>

Attachment D

—Original Message—
From: Foreman, Leroy Mr DoD OGC
Sent: Monday, July 09, 2007 10:20
To: Sullivan, Dwight, COL, DoD OGC
Subject: FW: APPROVAL/ PROMULGATION OF RULES OF PRACTICE FOR THE COURT OF MILITARY COMMISSION REVIEW (CMCR)

Dwight,

CMCR Rules are attached.

Best regards,

Lee

LeRoy F. Foreman
Clerk of Court, CMCR
[redacted]

—Original Message—
From: Rolph, John W CAPT Navy-Marine Corps Court of Criminal Appeals
Sent: Monday, July 09, 2007 9:31 AM
To: Foreman, Leroy Mr DoD OGC
Subject: FW: APPROVAL/ PROMULGATION OF RULES OF PRACTICE FOR THE COURT OF MILITARY COMMISSION REVIEW (CMCR)

Here it is, Lee.

—Original Message—
[redacted]
Subject: APPROVAL/ PROMULGATION OF RULES OF PRACTICE FOR THE COURT OF MILITARY COMMISSION REVIEW (CMCR)

Judges and Staff of the CMCR:

On Friday, 22 June 2007, I was honored to be formally sworn in as the Deputy Chief Judge of the Court of Military Commission Review (CMCR).
In this capacity, I have approved and promulgat <<Rules of Practice CMCR Approval and Promulgation Letter.pdf>> e <<Rules for Court of Military Commission Review (27 June 2007)).pdf>> d the Rules of Practice for the CMCR. A copy of the final Rules of Practice and the letter of approval/promulgation are appended.

Our next order of business is to formally swear in all the military appellate judges assigned to the Court. We are tentatively scheduling that evolution for 0900 on Wednesday, 11 July 2007, here in Washington,

Attachment E

D.C. The exact location will be provided to you next week. After a formal swearing in ceremony, we will conduct an "orientation briefing"
to bring all of you up to date regarding a number of the administrative matters relating to the Court and how it will conduct business. Next week, I hope to provide each of you with:

1) A copy of the oath that will be administered;
2) The exact location and uniform/robe for the swearing in ceremony; and
3) A specific agenda for the meeting that will follow the swearing in ceremony (including how long it will last).

Please let me know if you will not be able to attend this gathering as tentatively scheduled.

Thank you very much, and I look forward to working with each of you.

V/R

John Rolph

Captain John W. Rolph, JAGC, USN
Deputy Chief Judge
Court of Military Commission Review
One Liberty Center
[redacted]

Attachment E